

**WAUKESHA COUNTY BOARD OF ADJUSTMENT
SUMMARY OF MEETING**

The following is a Summary of the Board of Adjustment Meeting held on Wednesday, March 11, 2009, at 6:30 p.m. in Room AC 255/259 of the Waukesha County Administration Center, 515 W. Moreland Blvd., Waukesha County, Wisconsin, 53188.

BOARD MEMBERS PRESENT: Robert Bartholomew
Tom Day
Nancy M. Bonniwell
Robert Schuett

BOARD MEMBERS ABSENT: Walter Schmidt
Ray Dwyer

SECRETARY TO THE BOARD: Nancy M. Bonniwell

OTHERS PRESENT: Richard Mace, Planning and Zoning Division Manager
Sheri Mount, Sr. Land Use Specialist
Debbie Price, Corporation Counsel
Dean Richards, BA08:076, attorney
Mr. & Mrs. Dan Srnac, BA09:007, neighbors
Mr. & Mrs. Gerald Panawash, BA09:007, neighbors
Debbie Groskopf, BA09:005, agent
Don Murn, BA09:006, attorney
Mark Wamser, BA09:006, owner
Nicole Maher, BA09:006, attorney
Richard Krzton, BA09:007, owner
Linda Grus, BA09:007, friend
Jeff Wood, BA09:008, owner
Joseph Scherwenka, BA09:008, attorney
Dave Falstad, Waukesha County Supervisor
Gary & Barb Millikin, BA09:006, neighbor

The following is a record of the motions and decisions made by the Board of Adjustment. Detailed minutes of these proceedings are not produced, however, a taped record of the meeting is kept on file in the office of the Waukesha County Department of Parks and Land Use and a taped copy is available, at cost, upon request.

OTHER ITEMS REQUIRING BOARD ACTION:

Adoption of the Board of Adjustment Rules of Procedure

Mr. Day *I make a motion to adopt the amendments to the Board of Adjustment Rules of Procedure as presented on this date.*

The motion was seconded by Mr. Schuett and carried unanimously.

Discussion of Possible Board of Adjustment Policy Changes

The Board discussed and agreed upon going from two scheduled meetings per month to one with the ability to schedule additional meetings as necessary. There was further discussion regarding whether the regularly scheduled meeting should be on the second or fourth Wednesday of the month. It was determined that the regularly scheduled meeting should be on the second Wednesday of every month as long as this is acceptable to the Town of Merton. Planning and Zoning Division staff was directed to contact the Chairman of the Town of Merton BOA to confirm.

There was discussion regarding changing the Board's policy on the timing of the decisions. Historically the Board has held all the hearings on an agenda and then gone back and made all decisions at the end of the meeting. The Board is going to experiment with making the decision on each case as soon as the hearing on that case is closed.

There was discussion about the Board's use of a sample checklist to guide the hearings.

Election of Officers

Mr. Bartholomew: *I appoint Ms. Bonniwell for Secretary.*

Ms. Bonniwell: *I accept the appointment.*

Other Items:

The Board requested future agenda items to discuss past Board policy regarding floor area ratio, accessory buildings at the shoreline, and conditions regarding removal of structures prior to issuance of the zoning permit.

SUMMARIES OF PREVIOUS MEETINGS:

Mr. Day *I make a motion to approve the Summary of the Meeting of February 11, 2009.*

The motion was seconded by Mr. Schuett and carried unanimously.

NEW BUSINESS:**BA08:076 CHARLES AND JAN TERRIZZI (OWNERS) ATTY. DEAN RICHARDS (AGENT):**

Mr. Day *I make a motion to approve the after-the-fact request for a special exception from accessory building floor area ratio requirements , in accordance with the Staff's recommendation, as stated in the Staff Report and for the reasons stated in the Staff Report, with the following modification:*

Condition No. 1 shall be amended to read: "A Zoning Permit for the

“wood patio”/gazebo and the “lean-to”/firewood shed structures must be issued and the buildings must be moved to conforming locations (minimum of 5 ft. from all lot lines, 75 ft. from the Shore, and 35 ft. from the Established road right-of-way) by July 1, 2009.”

Condition No. 2 shall be amended to read: “In order to ensure that the structures are relocated to completely conforming locations, a Plat of Survey of the relocated structures must be provided to the Waukesha County Planning and Zoning Division staff by July 31, 2009.”

The motion was seconded by Mr. Schuett and carried unanimously.

The Planning and Zoning Division staff’s recommendation was for approval of the request for an after-the-fact special exception from the accessory building floor area requirements of the Waukesha County Shoreland and Floodland Protection Ordinance, to allow two (2) accessory structures that were constructed without permits to remain on the property subject to the following conditions:

1. A Zoning Permit for the “wood patio”/gazebo and the “lean-to”/firewood shed structures must be issued and the buildings must be moved to conforming locations (minimum of 5 ft. from all lot lines, 75 ft. from the Shore, and 35 ft. from the Established road right-of-way) by July 1, 2009.
2. In order to ensure that the structures are relocated to completely conforming locations, a Plat of Survey of the relocated structures must be provided to the Waukesha County Planning and Zoning Division staff by July 31, 2009.

The reasons for the recommendation, as stated in the Staff Report, are as follows:

A special exception differs from a variance in that a special exception does not necessarily require the demonstration of an unnecessary hardship. However, when granting special exceptions, the Board must still consider whether the proposed special exception would be hazardous, harmful, noxious, offensive, or a nuisance to the surrounding neighborhood by reason of physical, social or economic effects, and the Board may impose such restrictions or conditions they deem necessary for the protection of adjacent properties and the public interest and welfare. As long as the accessory buildings are located in conforming locations, since this is such a large property, staff feels that all requirements for a special exception are met. Therefore, the approval of the special exception, as conditioned, is within the purpose and intent of the Ordinance.

Mr. Day *I make a motion to **deny** the appeal of the staff determination that the flagstone/lannonstone along the shoreline constitutes a patio and therefore a regulated structure that required a permit.*

The motion was seconded by Mr. Schuett and carried unanimously.

Mr. Day *I make a motion to **deny** the request for after-the-fact variances from the shore setback, floodplain setback, and offset requirements of the Waukesha County Shoreland and Floodland Protection Ordinance to*

allow the patio to remain.

The motion was seconded by Mr. Schuett and carried unanimously.

The Planning and Zoning Division staff's recommendation was for **denial** of the petitioner's appeal of the staff determination that the flagstone along the shoreline constitutes a structure, more specifically a patio, and therefore is regulated per the Waukesha County Shoreland and Floodland Protection Ordinance.

Staff further recommends **denial** of the requested after-the-fact variances from the shore and floodplain setback requirements and **denial** of the requested after-the-fact variance from the offset requirements of the Ordinance to allow the patio to remain.

The reasons for the recommendation, as stated in the Staff Report, are as follows:

It has been clearly demonstrated that the flagstone placed along the shoreline of Lac LaBelle meets the County's definition of a structure (patio) and is therefore subject to all required setback and offset regulations and that permits were required for its construction. Furthermore, it has not been demonstrated, as required for a variance, that denial of the requested after-the-fact variances would result in an unnecessary hardship. A hardship has been defined by the Wisconsin Supreme Court as a situation where compliance with the strict letter of the restrictions governing area, setbacks, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome. This is a completely conforming lot that is much larger and wider than the district requires and there is no justifiable reason why the district requirements can't be met. The property can be used for a permitted purpose without the need for this large patio 0 feet from the shore and floodplain. It is not necessary to have a patio at all to have a reasonable use of any property. Variances should only be granted to accommodate physical limitations on a property that prevent a reasonable use of the property; not to accommodate the personal preferences or needs of the current property owner. Accessory structures such as patios, decks, etc., are amenities to a property, but are not necessary for reasonable residential use of any property. Case law has repeatedly held that petitioners are not entitled to the "highest and best use" of a property, but only reasonable use. The owners already have more than a "reasonable use" of this property with 7,974 sq. ft. of living and storage space (not including the fully exposed basement level) and multiple decks and patios located in conforming locations throughout the property.

The Ordinance is intended (among other things) to preserve shore cover and natural beauty by preventing shoreline encroachment by structures. Approval of this request to allow the proliferation of illegal structures within the shore setback area has a negative impact on the lake and would directly conflict with the purpose and intent of the Ordinance. Further, allowing the patio to remain within the offset area has a negative impact on the adjacent property owner. There are also no unique property features specific to this site to justify the granting of the requested variances. The petitioners argue that the patio was placed due to shoreline erosion and to increase infiltration. However, shoreline erosion is not unique to this property and there are other options to address these types of issues beyond constructing illegal patios. Furthermore, this property has a concrete seawall along the entire shoreline, so

it's difficult to imagine how significant "shoreline erosion" could have occurred here. It should also be noted that a portion of the shoreline area of this property is within mapped floodplain and therefore some periods of flooding and saturation are to be expected. Although it's true that the previous structure was completely impervious concrete, the flagstone patio is also essentially impervious as the stone themselves are very large, the gaps between the stones are extremely small and there is compacted gravel beneath them. Furthermore, the current stone patio is much larger than the pre-existing concrete patio. Also, it's impossible to argue that the patio provides more infiltration than natural grass/vegetation and topsoil would and therefore the argument that the patio was placed to increase infiltration, reduce erosion, and protect the shoreline is simply not viable. It seems clear that the patio was constructed due to personal preference of the property owner. The request does not meet any of the legal standards for the granting of a variance and therefore, the approval of this request would not be in conformance with the purpose and intent of the Ordinance. Please note that this means the entire patio must be removed. The deadline for removal of the patio shall be set by staff through handling of the existing violation. Any hardship this places on the property owner is self-created.

BA09:005 ROBERT AND CARIN SCHOEN (OWNERS) GROSKOPF CONSTRUCTION (AGENT):

Mr. Day

*I make a motion to **approve** the request, in accordance with the Staff's recommendation, as stated in the Staff Report and for the reasons stated in the Staff Report.*

The motion was seconded by Ms. Bonniwell and carried unanimously.

The Planning and Zoning Division staff's recommended **approval** of the requested variance from the floor area ratio requirements of the Waukesha County Shoreland and Floodland Protection Ordinance to allow a second story addition, with the following conditions:

1. The proposed second floor addition must not extend beyond the perimeter of the existing residence, with overhangs not to exceed 2 ft. in width.
2. The height of the addition is not to exceed 8 ft.
3. No more than 49.5 sq. ft. may be added to the structure (as proposed).
4. Prior to the issuance of a Zoning Permit, the final construction plans for the addition must be submitted to Planning and Zoning Staff for review and approval.

The reasons for the recommendation, as stated in the Staff Report, are as follows:

The approval of this request, as conditioned, will allow the construction of a very small second story addition within the footprint of the existing structure. The addition is very small. As conditioned, there will be no increase in any encroachments or reductions of open space or additional impervious surface added to the property. Without the variance, there

may not be full use of the residence since there is no tub in the residence today. The addition will allow for installation of a tub. Therefore, the approval of this request, as conditioned, will not be contrary to the public interest and will be within the purpose and intent of the Ordinance as well as within the intent of previous Board decisions.

BA09:006 MARK WAMSER (OWNER) ATTY. DONALD J. MURN (AGENT):

At the public hearing on March 11, 2009, the owner's attorney rescinded the appeal of the staff denial of the Certified Survey Map; therefore, no action was taken on this matter.

Mr. Schuett *I make a motion to approve the request for a variance from the lot size requirements*

The motion was seconded by Mr. Barthlomew. The motion was opposed by Mr. Day and Ms. Bonniwell. The vote was 2-2, therefore the motion failed to carry. Therefore, the request was not approved.

The Planning and Zoning Division staff recommended **denial** of the request for a variance from the lot size requirements of the Waukesha County Zoning Code/Waukesha County Shoreland and Floodland Protection Ordinance.

The reasons for the recommendation, as stated in the Staff Report, are as follows:

Allowing the Certified Survey Map to be approved through a variance from the lot size requirements is not appropriate because the approval of the variances would have the effect of rezoning the properties, which is specifically prohibited by Section 19.03(4) of the Zoning Code. This section states that the no action of the Board of Adjustment “*shall have the effect of permitting in any district a use prohibited in that district; of rezoning; of allowing the division of a parcel to create additional parcels which are not in conformity with the zoning district regulations in which it is located*”. The property is zoned A-2 Rural Home District, which, under Section 8.04 (2), requires a minimum lot area of three (3) acres. The proposed Lots 1 and 2 are only 2.24 acres and 2.05 acres, respectively. Therefore, approval of the request would have the effect of rezoning the property by allowing smaller lot sizes than the District requires.

The petitioner has several options available to remedy this situation. One alternative would be to apply for a Waukesha County Development Plan Amendment and Rezone of the property to a land use and zoning category that would make the parcels conforming, as the proposed lots are not in conformance to the Waukesha County Development Plan. The Waukesha County Development Plan currently designates the property as Rural Residential, which has a recommended density of 5 acres per dwelling unit. Therefore, rezoning the property to a zoning district with a smaller minimum lot size that could permit the lots shown on the Certified Survey Map could not be accomplished without first amending the Waukesha County Development Plan. However, this office will most likely not recommend that the Development Plan Amendment or that the Rezone be approved as a rezoning of this property to a category with a lot size requirement of less than three (3) acres would not be

consistent with the surrounding area and would result in a “spot zone”.

The property owner has been instructed that the easiest and most viable solutions are to either legally combine all three (3) parcels into one (1) parcel; or to combine the parcels or portions thereof in such a manner as to create a conforming three acre lot containing the house and transfer (i.e. sell) the remaining area to an adjacent property owner. The property owner to the south has expressed an interest in acquiring the southerly parcel or a portion thereof. All other properties in the surrounding area are at least three (3) acres in size and there is no justifiable reason that this owner cannot make use of a legally conforming property.

BA09:007 RICHARD KRZTON:

Mr. Day

I make a motion to approve the request, in accordance with the Staff's recommendation, as stated in the Staff Report and for the reasons stated in the Staff Report, with the following change:

Condition No. 3 shall be amended to read: “A Declaration of Restrictions shall be prepared by the Planning and Zoning Division Staff, stating that the converted barn residence is not to be used as two separate living units, multi-family structure, duplex, separate rental unit, in-law suite, or anything similar unless additional approvals are obtained from the Town of Genesee and Waukesha County. This Deed Restriction shall also state that only one utility service is permitted on this property for the converted barn residence to ensure that a second living unit is not created in this building. Prior to the issuance of a Zoning Permit, this Declaration of Restrictions must be signed by the owner, notarized, and recorded with the Waukesha County Register of Deed's Office, and a copy furnished to the Planning and Zoning Division Staff. This restriction must be recorded by May 1, 2009.”

The motion was seconded by Ms. Bonniwell and carried unanimously.

The Planning and Zoning Division staff's recommendation was for **approval** of the request for an after-the-fact variance from the remodeling a non-conforming structure in excess of 50% of its fair market value requirements of the Waukesha County Zoning Code, with the following conditions:

1. This structure (converted barn residence) shall only contain one living unit. The remodeled first floor is NOT to be utilized as a second/separate living unit. There is not to be a permanent lock on the door that separates the upstairs and downstairs portions of the residence. There is to be open access between the floors of this residence at all times.
2. The residence is to be utilized as a single family structure ONLY. Please note that a “single family” is defined as *a body of persons who live together in one dwelling unit as a single housekeeping entity*. A “housekeeping entity” is defined as *a housing or lodging unit where all of the amenities of bathing and sanitary facilities, eating, cooking, living, sleeping, and*

storage are provided the persons or body of persons occupying and living together as a single entity within the unit.

3. A Declaration of Restrictions shall be prepared by the Planning and Zoning Division Staff, stating that the converted barn residence is not to be used as a separate living unit, multi-family structure, duplex, separate rental unit, in-law suite, or anything similar unless additional approvals are obtained from the Town of Genesee and Waukesha County. This Deed Restriction shall also state that only one utility service is permitted on this property for the converted barn residence to ensure that a second living unit is not created in this building. Prior to the issuance of a Zoning Permit, this Declaration of Restrictions must be signed by the owner, notarized, and recorded with the Waukesha County Register of Deed's Office, and a copy furnished to the Planning and Zoning Division Staff. This restriction must be recorded by May 1, 2009.
4. No additions or work to the silo is permitted without additional approvals.
5. Only the work specifically proposed is authorized. Any additional work requires additional permits and variances.
6. Prior to the issuance of a Zoning Permit, the Environmental Health Division must certify that the existing septic system is adequate for the proposed construction, or a Sanitary Permit for a new waste disposal system must be issued and a copy furnished to the Planning and Zoning Division staff.

The reasons for the recommendation, as stated in the Staff Report, are as follows:

This structure has existed for many years and has been granted multiple variances in the past to be remodeled and used as a single family structure. As conditioned, the use of the building will remain unchanged from previous approvals. No additions or further encroachments into the setback areas are proposed. Therefore, the approval of this request is within the purpose and intent of the Ordinance and previous approvals of the Board of Adjustment. Although there was much public discussion regarding the fact that there is a potential second living unit in the structure and that the other residence is not being utilized as the caretakers unit as required by previous approvals, that is an enforcement issue for County Planning and Zoning Division Staff and not an issue for the Board of Adjustment to address.

BA09:008 JEFF WOOD:

Ms. Bonniwell

I make a motion to adjourn the hearing until April 8, 2009.

The motion was seconded by Mr. Schuett and carried unanimously.

The Planning and Zoning Division staff's recommendation was for **denial** of the appeal of the determination of the Waukesha County Planning and Zoning Division staff that recent and ongoing remodeling, reconstruction, and additions to an existing residence have exceeded 50% of the fair

market value of the residence.

The reasons for the recommendation, as stated in the Staff Report, are as follows:

The Board should not grant the petitioner's appeal of the Planning and Zoning Division Staff's decision that the project has exceeded 50% of the fair market value of the structure. It simply is not reasonable to think that a person can reconstruct and add onto a residence resulting in over 2,000 sq. ft. for \$32,372.57 when considering fair market costs and values. The only items remaining from the original structure are the foundation, approximately 30 studs and a basement overhang.

In the event that the Board of Adjustment upheld the staff determination, the Planning and Zoning staff further recommended **denial** of the request for an after-the-fact variances from the remodeling, reconstruction, and additions to a non-conforming structure in excess of 50% of its fair market value and road setback requirements of the Waukesha County Zoning Code to permit the construction.

The reasons for the recommendation, as stated in the Staff Report, are as follows:

It has not been demonstrated, as required for a variance, that denial of the requested after-the-fact variances would result in an unnecessary hardship. A hardship has been defined by the Wisconsin Supreme Court as a situation where compliance with the strict letter of the restrictions governing area, setbacks, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome. Hardships should not be financial or economic in nature. The petitioner is asking that the Board consider the value that has been invested into the improvements. However, the petitioner was aware of the limitations on improvements that could be made to the property and should have contacted the Planning and Zoning Division prior to exceeding the parameters of the original permit. The petitioner was also aware that there was a conforming location to rebuild a residence on the property. The property is over three (3) acres in size, is gently sloping, and has well drained soils. There are no physical limitations on the property that would prevent the petitioner from constructing a new residence in a conforming location on the lot. The petitioner has argued that the granting of the variance will please the neighbors since the building was decaying and becoming a nuisance with safety concerns. The Board should recognize that the purpose and intent of the 50% provision is to eliminate non-conforming structures and to avoid prolonging the life of such structures, so that when significant modifications need to be made, the cost of improvements can be invested in relocating such non-conforming structures in a conforming location so that the health, safety, and general welfare and attractiveness of the community environment of Waukesha County can be maintained. Even though there are no immediate plans to widen or improve C.T.H. "X", if C.T.H. "X" were ever widened to the full extent of the established road right-of-way, the residence would be located approximately 20 ft. from a county highway which is not promoting or preserving the general attractiveness and character of the community and will adversely affect this residence if it is permitted to remain so close to the right-of-way of this busy, winding road.

The request does not meet any of the legal standards for the granting of a variance and therefore, the approval of this request would not be in conformance with the purpose and intent of the Ordinance. Please note that this means the residence must be razed and relocated in a conforming location on the property with the approval of a Zoning Permit. Any hardship this places on the property owner is self-created as the owner was aware of the consequences of exceeding 50% of the value of the structure prior to beginning construction.

ADJOURNMENT:

Mr. Schuett *I make a motion to adjourn this meeting at 1:20 a.m. on March 12, 2009.*

The motion was seconded by Mr. Bartholomew and carried unanimously.

Respectfully submitted,

Nancy M. Bonniwell
Secretary, Board of Adjustment